In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 982

NICHOLAS A. STIRONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 20–27) is reported at 341 F. 2d 253. The opinion of the district court (P.A. 23–37) [1] is reported at 222 F. Supp. 507.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1965. The petition for a writ of certiorari was filed on March 13, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "P.A." refers to petitioner's appendix in the court of appeals. "R." refers to the certified record.

770-211—65

QUESTION PRESENTED

Whether petitioner's conviction is open to collateral attack because of alleged irregularities during the selection of the jurors to which petitioner made no objection at the time.

STATEMENT

In October 1961 petitioner was convicted in the Western District of Pennsylvania of extortion in violation of the Hobbs Act (18 U.S.C. 1951).[2] He was sentenced to serve ten years in prison and to pay a fine of $10,000 (P.A. 5). After the court of appeals affirmed the conviction (311 F. 2d 277) and this Court denied certiorari (372 U.S. 935), petitioner filed a motion under 28 U.S.C. 2255 to vacate sentence, alleging that his trial was unfair because (1) the deputy clerk conducted the *voir dire* examination, (2) the trial judge was absent during the impaneling of the jury, and (3) the court reporter did not record the impaneling proceedings (P.A. 2–4). The district court heard argument, made findings of fact, and denied the motion (P.A. 23–37; 222 F. Supp. 507).

The transcript of petitioner's trial shows that the following occurred near the outset of the proceedings (P.A. 42–43):

> The COURT. All right. All right gentlemen, proceed with the selection of the jury. As is customary and routine here, Miss Barr [the deputy clerk] will handle the proceedings. There are some 40 jurors back there, I take it, and you all know your challenges. You will

[2] This Court reversed an earlier conviction under the same indictment. See *Stirone* v. *United States*, 361 U.S. 212.

proceed. If any questions come up, why, I am right here available.

(Whereupon a Jury was duly empanelled).

The COURT. All right. Swear the jury.

(Whereupon the Jury was duly sworn).

The district judge found, based on his own recollection, that during the unreported impaneling proceedings he was present on the bench while the deputy clerk asked the prospective jurors six questions as prescribed by the district court's Rule 19 (Pet. 30–31) and a seventh question proposed by the government. During the peremptory challenges, however, the judge retired to his chambers, a few steps away, where he remained available to resolve any difficulties that might arise (P.A. 14–15, 25, 28–30, 83–84). Petitioner's trial counsel, who was a member of the committee that drafted Rule 19 and who had practiced criminal law in the district court for 21 years, made no objection to the proceedings (P.A. 11–12, 16, 26, 31–34). Nor was objection made in petitioner's motion for a new trial or in his appeal from the conviction (P.A. 34–35) to the judge's absence, to the deputy clerk's conducting the proceedings, or to the failure of the reporter to record the *voir dire*.

Petitioner challenged the findings during the hearing and in a motion to correct the record under F.R. Civ. P. 75(h), in that he contended that the judge left the courtroom before the deputy clerk examined the jurors and was absent during the entire impanelment (P.A. 11, 50–76).[3] The judge, however,

[3] The motion to correct the record, filed after the appeal had been docketed in the court of appeals, asked the district judge to amend his finding of fact that he was absent only during

said that he would "categorically state that in the instant case [he] was present during all of the *voir dire*" (P.A. 25). He said that he had "a distinct memory of the *voir dire* examination. Possibly that is so because the selection of the jury went so smoothly" (P.A. 26).

While expressing disapproval of the practices of trial judges' leaving the bench during any part of the jury selection and of court reporters' failing to record the *voir dire,* the court of appeals ruled that on the facts of this case, in which petitioner made no objection and established no prejudice, the conviction could not be collaterally attacked (Pet. 20–27).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 6–10) that his sentence should be vacated because the judge was absent for a short time during the selection of the jury. The district court found that the facts did not support this claim, and petitioner has made an inadequate showing to impeach the judge's recollection.[4]

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the peremptory challenges. The motion was supported by several affidavits of persons present during the trial, some saying that the judge was absent the entire time and others disclaiming any memory of the proceedings (see *e.g.*, P.A. 62, 68–69, 73).

[4] Since the trial judge's own recollection was—to use his own words—"absolutely clear" (P.A. 83), he could not credit the contradictory evidence that petitioner sought to introduce in support of a motion to correct the record pursuant to F.R. Civ. P. 75(h). Under Rule 75(h), when the moving party and the judge disagree over what occurred at the trial, and their only difference is one of recollection, the judge's version of the facts must prevail unless his version is shown to be arbitrary or fraudulent—a showing that has hardly been made in the present

In any event, the judge's absence did not present an issue cognizable under Section 2255. Petitioner had been represented by counsel who had practiced criminal law for 21 years in the district court. Counsel's failure even to mention the incident during the trial, in his motion for a new trial, and on direct appeal manifests conscious acquiescence in the judge's absence. Nor has petitioner shown any prejudice. The federal cases [5] uniformly hold that the presence of the judge can be waived, and his absence is not reversible error, even on direct appeal, unless prejudice is shown. *Haith* v. *United States*, decided March 1, 1965 (C.A. 3, No. 15091), affirming after remand 330 F. 2d 198; *Heflin* v. *United States*, 125 F. 2d 700 (C.A. 5), certiorari denied, 316 U.S. 687; *In re Eskay*, 122 F. 2d 819, 825 (C.A. 3) (dictum); *United States* v. *Sams*, 219 F. Supp. 164 (W.D. Pa.).

2. The court reporter had a statutory duty to record the *voir dire* examination (28 U.S.C. 753(b)), but even on direct appeal failure to record is not, *ipso facto*, reversible error. *E.g.*, *United States* v. *Sigal*, decided February 11, 1965 (C.A. 3, No. 14475); *Addison* v. *United States*, 317 F. 2d 808 (C.A. 5), certiorari denied, 376 U.S. 905; *Brown* v. *United States*, 314 F. 2d 293 (C.A. 9).[6] A conviction will not be reversed

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case. *Clawans* v. *White*, 112 F. 2d 189 (C.A.D.C.) (per Rutledge, J.), certiorari denied, 311 U.S. 646; Moore's *Federal Practice* ¶ 75.15 (2d ed., 1964).

[5] The State cases, collected in 23 *Corpus Juris Secundum* § 972, are in conflict in their views on the presence of the judge.

[6] In the *Brown* case, the court remanded for a hearing under F.R. Civ. P. 75(h) to reconstruct the record. But that case has no application to petitioner, who has already reconstructed the record at the Section 2255 hearing in the district court.

on appeal unless a specific error has occurred that cannot be reviewed without a transcript. *E.g., Washington* v. *United States*, 327 F. 2d 793 (C.A. 5); *Parrott* v. *United States*, 314 F. 2d 46 (C.A. 10). Here petitioner can show neither prejudice nor error during the *voir dire*. *A fortiori*, failure to comply with the court reporter statute is not cognizable error on collateral attack. *United States* v. *Bebik*, 333 F. 2d 736 (C.A. 4); *United States* v. *Taylor*, 303 F. 2d 165, 169 (C.A. 4).

3. Assuming *arguendo* that the deputy clerk's reading the *voir dire* questions to the jury did not fully comply with F.R. Crim. P. 24(a), mere violation of a rule of procedure is not cognizable under Section 2255. *E.g., Hill* v. *United States*, 368 U.S. 424. Under local Rule 19 the deputy clerk was to read only the questions set forth in the rule itself, and such additional questions as were approved by the court. Hence her function was entirely ministerial and required the exercise of no discretion or judgment. Petitioner's trial counsel did not object, and petitioner's present claims of prejudice are too remote and speculative to be seriously considered.[7]

[7] Contrary to petitioner's final contention (Pet. 16–18), the normal delay inherent in the litigation process did not work a suspension of the writ of habeas corpus, particularly since most of the delay resulted from continuances obtained by petitioner (R. 1–5, 7–8, 17, 18–19, 22).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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